

The Good-Faith Exception and Unsettled Law: A Study of GPS Tracking Cases After *United States v. Jones*

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I. INTRODUCTION

The Fourth Amendment undoubtedly prohibits the government from breaking down doors on a mere hunch that the people inside are engaged in

illegal activity.¹ It even prohibits the government from breaking down doors in the good-faith but mistaken belief that doing so does not violate the law.² But less clear is what the Fourth Amendment requires when the government's violation of these prohibitions turns up evidence against the suspect.³ May the government use this evidence despite its unconstitutional provenance?

Although the Fourth Amendment restricts the state to reasonable searches and seizures, it does not say whether the state may use evidence acquired through unreasonable searches.⁴ Over the years, the Supreme Court has struggled to determine what to do with illegally obtained evidence. In its early cases, the Court developed what came to be called the exclusionary rule: evidence obtained by illegal searches generally may not enter the courtroom.⁵ The Court understood the rule as a corollary to the Fourth Amendment.⁶ What would be the point of outlawing unreasonable searches, the Court reasoned, if the fruits of those searches could still secure convictions?⁷ And presumably the courts should not participate in an activity that smacks of condoning police illegality.⁸ In the latter half of the twentieth century, however, the Court began

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¹ *Payton v. New York*, 445 U.S. 573, 576 (1980) (citations omitted) (“[T]he Fourth Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, prohibits the police from making a warrantless and nonconsensual entry into a suspect’s home in order to make a routine felony arrest.”).

² *United States v. Leon*, 468 U.S. 897, 905 (1984) (accepting lower court’s holding that police lacked probable cause to conduct a search while finding that they acted in good-faith belief that a warrant authorized the search).

³ See, e.g., Matthew Allan Josephson, *To Exclude or Not To Exclude: The Future of the Exclusionary Rule After Herring v. United States*, 43 CREIGHTON L. REV. 175, 203 (2009) (“[T]he contours of the exclusionary rule are not exactly clear . . .”).

⁴ See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

⁵ See, e.g., *Olmstead v. United States*, 277 U.S. 438, 462 (1928) (describing the “striking outcome” of evidence being excluded in *Weeks*); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (holding that letters taken from defendant’s home during a warrantless search could not be admitted at trial); *Boyd v. United States*, 116 U.S. 616, 638 (1886) (holding the trial court’s forced production of the defendants’ private papers an unreasonable search and seizure and excluding the evidence).

⁶ *Mapp v. Ohio*, 367 U.S. 643, 651 (1961) (“[T]he exclusionary rule is an essential ingredient of the Fourth Amendment . . .”).

⁷ *Weeks*, 232 U.S. at 393 (“If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.”).

⁸ See *Elkins v. United States*, 364 U.S. 206, 223 (1960) (“Even less should the federal courts be accomplices in the willful disobedience of a Constitution they are sworn to uphold.”).

reinterpreting the rule as judge-made doctrine intended merely to reinforce the Fourth Amendment.⁹ This development in effect de-constitutionalized the exclusionary rule. Deterring police misconduct came exclusively to define the scope of the rule and its application.¹⁰

In light of the new view of the exclusionary rule as a police deterrent rather than a constitutional protection, the Court has developed the “good-faith” exception. Under this exception, evidence that police officers acquire in good-faith reliance on the current state of the law is admissible even if the law subsequently changes. In a line of cases beginning with *United States v. Leon*,¹¹ the Court has applied the exception—i.e., has admitted evidence that was illegally acquired—when police relied on invalid warrants,¹² subsequently overturned statutes,¹³ clerical database errors by judicial administrators,¹⁴ clerical database errors by police,¹⁵ and, most recently in *Davis v. United States*,¹⁶ on subsequently overturned “binding judicial precedent.”

In *Davis*, the majority left open the question of whether the good-faith exception applies when no binding precedent existed at the time of the illegal police action.¹⁷ Since the *Davis* decision, district courts have begun to split on this question of how to apply the exception when police act in the face of unsettled law.¹⁸ The split reflects a general uncertainty about the breadth of the

⁹ See, e.g., *United States v. Calandra*, 414 U.S. 338, 348 (1974) (“In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.”).

¹⁰ See, e.g., *United States v. Janis*, 428 U.S. 433, 454 (1976) (“If . . . the exclusionary rule does not result in appreciable deterrence, then, clearly, its use in the instant situation is unwarranted.”); *Elkins*, 364 U.S. at 217 (“The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”).

¹¹ *United States v. Leon*, 468 U.S. 897, 922 (1984) (holding that a police officer’s objectively reasonable reliance on a facially invalid warrant should not result in exclusion of evidence obtained through search pursuant to the warrant).

¹² *Id.*

¹³ *Illinois v. Krull*, 480 U.S. 340, 356–57 (1987) (officer reasonably relied on subsequently overturned statute authorizing warrantless administrative searches).

¹⁴ *Arizona v. Evans*, 514 U.S. 1, 15–16 (1995) (officer reasonably relied on invalid arrest warrant when court clerk’s computer error failed to indicate the warrant had been quashed).

¹⁵ *Herring v. United States*, 555 U.S. 135, 137–39, 144 (2009) (no exclusion when police reasonably rely on an invalid warrant due to negligent recordkeeping by police in a neighboring county).

¹⁶ 131 S. Ct. 2419, 2428–29 (2011) (officers reasonably relied on binding judicial precedent in conducting automobile search at the time of arrest).

¹⁷ *Id.* at 2435 (Sotomayor, J., concurring) (“This case does not present the markedly different question whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled.”).

¹⁸ See *United States v. Ford*, No. 1:11–CR–42, 2012 WL 5366049, at *10 (E.D. Tenn. Oct. 30, 2012) (recognizing emerging district court split).

good-faith exception.¹⁹ While one might construe the *Davis* holding narrowly and conclude that the case changed little, the Court's rationale employs strong, sweeping language that suggests a much broader application.²⁰ Accordingly, one group of district courts has read *Davis* narrowly as extending the good-faith exception only to officers acting in circuits with binding precedent.²¹ Another group of courts has extended the rationale of *Davis* to circuits without binding precedent, allowing police to rely on nonbinding case law.²²

Many commentators on the *Davis* case have focused on the question of whether the exclusionary rule continues to have relevance.²³ Those who worry that *Davis* has effectively gutted the exclusionary rule focus on its broad rationale rather than on its holding.²⁴ Less thoroughly explored is the way lower courts are actually applying *Davis* and why. The Supreme Court's decision in *United States v. Jones*²⁵ in early 2012, which overturned several circuits' precedents with respect to the use of GPS devices on automobiles,²⁶ has

¹⁹ See *id.*; see also *infra* Part III.A–B.

²⁰ George M. Dery III, "This Bitter Pill": The Supreme Court's Distaste for the Exclusionary Rule in *Davis v. United States* Makes Evidence Suppression Impossible To Swallow, 23 GEO. MASON U. C.R. L.J. 1, 2 (2012) ("The rationale the Court advanced went well beyond its holding . . ."); see also Tracey Maclin & Jennifer Rader, *No More Chipping Away: The Roberts Court Uses an Axe To Take Out the Fourth Amendment Exclusionary Rule*, 81 MISS. L.J. 1183, 1190 (2012) (arguing that *Davis* does not merely "chip away" at the exclusionary rule but rather demonstrates that "the opponents of the exclusionary rule have won"); James J. Tomkovicz, *Davis v. United States: The Exclusion Revolution Continues*, 9 OHIO ST. J. CRIM. L. 381, 395 (2011).

²¹ See *United States v. Robinson*, 903 F. Supp. 2d 766, 784 (E.D. Mo. 2012); *United States v. Ortiz*, 878 F. Supp. 2d 515, 541 (E.D. Pa. 2012); *United States v. Lujan*, No. 2:11CR11-SA, 2012 WL 2861546, at *3 (N.D. Miss. July 11, 2012); *United States v. Lee*, 862 F. Supp. 2d 560, 571 (E.D. Ky. 2012); *United States v. Katzin*, No. 11–226, 2012 WL 1646894, at *9 (E.D. Pa. May 9, 2012).

²² See *United States v. Batista*, No. 5:12cr11, 2013 WL 782710, at *6 (W.D. Va. Feb. 28, 2013); *United States v. Fisher*, Nos. 2:10–cr–28, 2:10–cr–32, 2013 WL 214379, at *2 (W.D. Mich. Jan. 18, 2013); *United States v. Guyton*, No. 11–271, 2013 WL 55837, at *3 (E.D. La. Jan. 3, 2013); *Ford*, 2012 WL 5366049, at *11; *United States v. Oladosu*, 887 F. Supp. 2d 437, 443 (D.R.I. 2012); *United States v. Rose*, 914 F. Supp. 2d 15, 22 (D. Mass. 2012); *United States v. Lopez*, 895 F. Supp. 2d 592, 605 (D. Del. 2012); *United States v. Baez*, 878 F. Supp. 2d 288, 294 (D. Mass. 2012); *United States v. Leon*, 856 F. Supp. 2d 1188, 1194–95 (D. Haw. 2012).

²³ See, e.g., Craig M. Bradley, *Is the Exclusionary Rule Dead?*, 102 J. CRIM. L. & CRIMINOLOGY 1, 2 (2012). In Professor Bradley's view, the exclusionary rule survives *Davis* and can continue to provide sufficient protection from Fourth Amendment violations. See *id.* at 22–23. He urges exclusion in cases where police negligence leads to "substantial" violations of privacy rights. *Id.* at 23; see also 1 WAYNE R. LAFAVE, SEARCH & SEIZURE § 1.3(h), at 146 (5th ed. 2012) (concluding that *Davis* "looks much like a recipe for total abandonment of the Fourth Amendment exclusionary rule").

²⁴ See *supra* note 23.

²⁵ 132 S. Ct. 945 (2012).

²⁶ When the Supreme Court handed down its opinion in *Jones*, the FBI stopped monitoring thousands of GPS devices it had already installed. Julia Angwin, *FBI Turns Off*

provided an opportunity for lower courts to determine how—and whether—*Davis* will apply to retroactively illegal searches made in the absence of clear binding precedent.²⁷ A careful look at how these courts are applying *Davis* can help shed light on the current status of the exclusionary rule in the lower courts.

After outlining the contours of the lower court debate, this Note argues that courts should apply the good-faith exception only when the law clearly establishes that a particular police action is constitutional. This method borrows from and repurposes the “clearly established” standard from qualified immunity doctrine.²⁸ Part II lays the foundation of the issue by tracing the historical development of the exclusionary rule and the good-faith exception. Part III presents a case study of the application of the good-faith exception in the cases following the Supreme Court’s development of the Fourth Amendment in *United States v. Jones*. Lastly, Part IV argues that a “clearly established” standard in these cases would best serve the purposes of the Fourth Amendment and the exclusionary rule, and subsequently demonstrates the application of the rule to some of the fact-scenarios of the post-*Jones* GPS cases.

II. EXCLUSION’S RISE AND FALL, AND THE ROLE OF GOOD FAITH

A defendant’s motivation for raising a Fourth Amendment claim often arises from the possibility of suppressing illegally obtained evidence.²⁹ This

Thousands of GPS Devices After Supreme Court Ruling, WALL ST. J. DIGITS BLOG (Feb. 25, 2012, 3:36 PM), <http://blogs.wsj.com/digits/2012/02/25/fbi-turns-off-thousands-of-gps-devices-after-supreme-court-ruling/>.

²⁷ For differing views on how post-*Jones* courts should handle the exclusionary rule issues that have arisen, see Caleb Mason, *New Police Surveillance Technologies and the Good-Faith Exception: Warrantless GPS Tracker Evidence After United States v. Jones*, 13 NEV. L.J. 60, 64 (2012) (adopting the narrow view) and Kyle Robbins, Comment, *Davis, Jones, and the Good-Faith Exception: Why Reasonable Police Reliance on Persuasive Appellant Precedent Precludes Application of the Exclusionary Rule*, 82 MISS. L.J. 1175, 1196 (2013) (adopting the broad view and proposing a totality-of-the-circumstances test to determine whether police reliance was reasonable).

²⁸ The Supreme Court itself has recognized the similarities between the good-faith exception and “good-faith” or qualified immunity. See *Malley v. Briggs*, 475 U.S. 335, 344 (1986). For an excellent discussion of the overlap between the two doctrines in Supreme Court decisions, see generally Jennifer E. Laurin, *Trawling for Herring: Lessons in Doctrinal Borrowing and Convergence*, 111 COLUM. L. REV. 670 (2011) (tracing the Supreme Court’s development of its exclusionary rule doctrine through borrowings from qualified immunity doctrine). For qualified immunity, the Court’s test asks whether officers had “fair warning that their alleged treatment of [the defendant] was unconstitutional.” *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (denying qualified immunity to prison guards who tied a prisoner to a “hitching post” for seven hours in the sun without water or bathroom breaks).

²⁹ See Orin S. Kerr, *Good Faith, New Law, and the Scope of the Exclusionary Rule*, 99 GEO. L.J. 1077, 1118 (2011) (“The exclusionary rule is critical because it provides the basic building block for the development of Fourth Amendment law.”); Charles Alan Wright, *Must the Criminal Go Free If the Constable Blunders?*, 50 TEX. L. REV. 736, 738 (1972)

makes the rule especially important to the enforcement of the constitutional privacy protection. Although the exclusionary rule began as a fundamental part of the protection, its role has waned considerably in the past several decades, particularly with the Court's development of the good-faith exception.

A. The Exclusionary Rule as Constitutional Mandate

In recent years, the Supreme Court has repeatedly pointed out that the Fourth Amendment contains no provision for excluding illegally obtained evidence from criminal trials.³⁰ But the Court did not always take the absence of explicit constitutional language to mean that exclusion lacked constitutional grounding.³¹ On the contrary, through much of the twentieth century the Court conceived of the exclusionary rule as the remedial corollary to the Fourth Amendment right.³² Part of the idea was that by denying police the ability to use the evidentiary fruits of their investigative labors, the exclusionary rule worked to deter police from future privacy invasions.³³ Until quite recently, other rationales also supported the rule, such as the judiciary's concern that it should not implicitly condone constitutional violations, as well as the public's concern that the government should not benefit from its illegal behavior.³⁴

("So far as anyone has been able to ascertain, there is no effective remedy for illegal searches and seizures other than the Exclusionary Rule.").

³⁰ *E.g.*, *Davis v. United States*, 131 S. Ct. 2419, 2426 (2011) ("The Amendment says nothing about suppressing evidence obtained in violation of this command. That rule—the exclusionary rule—is a 'prudential' doctrine . . ."); *United States v. Leon*, 468 U.S. 897, 906 (1984) ("The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands . . .").

³¹ *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) ("[W]ithout the *Weeks* rule the assurance against unreasonable federal searches and seizures would be 'a form of words,' valueless and undeserving of mention in a perpetual charter of inestimable human liberties . . ."); *Weeks v. United States*, 232 U.S. 383, 393 (1914) ("If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.").

³² *See, e.g.*, *Whiteley v. Warden, Wyo. State Penitentiary*, 401 U.S. 560, 568–69 (1971) (applying exclusion as a matter of course after identifying a Fourth Amendment violation); *Mapp*, 367 U.S. at 655 ("We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."); *Olmstead v. United States*, 277 U.S. 438, 467 (1928) ("The *Weeks* Case announced an exception to the common law rule by excluding all evidence in the procuring of which government officials took part by methods forbidden by the Fourth and Fifth Amendments.").

³³ *Elkins v. United States*, 364 U.S. 206, 217 (1960).

³⁴ *See* JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 351–52 (5th ed. 2010); LAFAVE, *supra* note 23, § 1.1(c), at 14; Robert M. Bloom & David H. Fentin, "A More Majestic Conception": The Importance of Judicial Integrity in Preserving the Exclusionary Rule, 13 U. PA. J. CONST. L. 47, 52–54 (2010).

Since the mid-1970s, however, deterrence has become the Court's sole rationale for exclusion,³⁵ and the result has been a profound weakening of the exclusionary rule.³⁶

B. *Exclusion Meets Its Match: The Spread of the Good-Faith Exception*

The new focus on deterrence gave rise to a utilitarian method for determining whether the exclusionary rule should apply at all: a weighing of costs and benefits.³⁷ Even before the advent of the balancing test, Judge Cardozo memorably summarized the cost side of the scale: "The criminal is to go free because the constable has blundered."³⁸ In this view, the criminal is no less culpable as a result of negligent or even intentionally illegal police behavior, so the exclusionary rule imposes on society the cost of leaving criminals unpunished.³⁹ Although the benefits of applying the exclusionary rule might include judicial integrity and general fairness, the Court has chosen to recognize only deterrence.⁴⁰ In the Court's current view, there can be no exclusion without deterrence, and the deterrence benefits must outweigh the costs of exclusion.⁴¹

³⁵ See, e.g., *Leon*, 468 U.S. at 906; *United States v. Calandra*, 414 U.S. 338, 347 (1974). A number of commentators have challenged the Court's view that the exclusionary rule can in fact deter police from constitutional violations. E.g., Michael D. Cicchini, *An Economics Perspective on the Exclusionary Rule and Deterrence*, 75 MO. L. REV. 459, 464 (2010) (arguing on purely theoretical grounds that "the exclusionary rule does not, and cannot, deter police misconduct"). But see LAFAYETTE, *supra* note 23, § 1.2(b), at 37 (describing the "soft" evidence supporting the rule's effectiveness at deterring Fourth Amendment violations).

³⁶ See Bloom & Fentin, *supra* note 34, at 59; David Gray, *A Spectacular Non Sequitur: The Supreme Court's Contemporary Fourth Amendment Exclusionary Rule Jurisprudence*, 50 AM. CRIM. L. REV. 1, 2 (2013).

³⁷ *Stone v. Powell*, 428 U.S. 465, 489–91 (1976) (holding that the rationales for applying the exclusionary rule on direct review do not support its extension to federal habeas corpus review).

³⁸ *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

³⁹ Some have argued, however, that the rights conferred by the Fourth Amendment impose the heavy costs, not the exclusionary rule itself. E.g., Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1392 (1983) ("Much of the criticism leveled at the exclusionary rule is misdirected; it is more properly directed at the fourth amendment itself.").

⁴⁰ Bloom & Fentin, *supra* note 34, at 53.

⁴¹ See *United States v. Janis*, 428 U.S. 433, 454 (1976) ("If . . . the exclusionary rule does not result in appreciable deterrence, then, clearly, its use in the instant situation is unwarranted.").

The good-faith exception developed naturally from a cost-benefit theory relying on deterrence.⁴² It is one of a handful of exceptions the Court has recognized to the general application of the exclusionary rule.⁴³ The core concept of the good-faith exception is that when police are doing their duty within existing law, there is nothing for the exclusionary rule to deter.⁴⁴ Explicitly rejecting the notion from earlier opinions that “the exclusionary rule is a necessary corollary of the Fourth Amendment,”⁴⁵ the Court in *United States v. Leon* held that the exclusionary rule should not apply when an officer relies on a facially valid warrant that turns out not to be supported by probable cause.⁴⁶ The Court’s reasoning helped to clarify that it construes the deterrence benefits of exclusion very narrowly. The relevant deterrence is of police personnel only; the cost-benefit analysis does not take into account, for example, the possibility that exclusion might deter a magistrate from negligently issuing warrants.⁴⁷

In the decade following *Leon*, the Court expanded the good-faith exception on similar principles. In *Illinois v. Krull*, the Court declined to apply the exclusionary rule when it held that a police officer acted in good-faith reliance on a state statute later found unconstitutional.⁴⁸ The Court expanded *Leon* again

⁴² See *United States v. Leon*, 468 U.S. 897, 913 (1984) (“[T]he balancing approach that has evolved during the years of experience with the [exclusionary] rule provides strong support for the [good-faith exception].”).

⁴³ See, e.g., *Hudson v. Michigan*, 547 U.S. 586, 599 (2006) (exclusionary rule does not apply to knock-and-announce violations); *United States v. Ceccolini*, 435 U.S. 268, 279 (1978) (evidence sufficiently attenuated from illegality need not be excluded); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) (no exclusion for illegally acquired evidence also acquired through an independent, legal avenue).

⁴⁴ See, e.g., *Leon*, 468 U.S. at 918–19 (stating that the exclusionary rule “cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity”).

⁴⁵ *Id.* at 905; see also *Massachusetts v. Sheppard*, 468 U.S. 981, 991 (1984) (decided the same day as *Leon* and similarly holding that a judge’s error in preparing a warrant does not require exclusion when the police officer acts in good-faith reliance on the warrant).

⁴⁶ *Leon*, 468 U.S. at 913. *Leon* has received a good deal of scholarly criticism. E.g., LAFAYE, *supra* note 23, § 1.3(b), at 71 (“The *Leon* result and reasoning is vulnerable on several different levels and from several different perspectives.”).

⁴⁷ *Leon*, 468 U.S. at 917. Why this should be so is not obvious. As the Supreme Court of Connecticut noted in rejecting *Leon* under its own state constitution, “the exclusionary rule, although primarily directed at police misconduct, is also appropriately directed at the warrant issuing process.” *State v. Marsala*, 579 A.2d 58, 66 (Conn. 1990). Connecticut is one of a number of states that have explicitly rejected *Leon*. E.g., *State v. Guzman*, 842 P.2d 660, 671 (Idaho 1992) (rejecting *Leon* in interpreting Idaho’s state constitutional search-and-seizure provision); *Gary v. State*, 422 S.E.2d 426, 428 (Ga. 1992) (recognizing Georgia’s statutory rejection of *Leon*).

⁴⁸ *Illinois v. Krull*, 480 U.S. 340, 360 (1987). With respect to police officers, the deterrence benefits were lacking in precisely the same way as in *Leon*. *Id.* at 350. Like judges and magistrates, legislators have no strong incentive to violate the Fourth Amendment, nor are they likely to be deterred from passing unconstitutional statutes for fear

in *Arizona v. Evans*, holding that the good-faith exception applies when a police officer executes a quashed arrest warrant that appeared in the police database due to a clerical error by a court clerk.⁴⁹

C. Herring: *A New Wrinkle in Good Faith*

With its decision in *Herring v. United States*, the Court significantly extended the good-faith exception beyond the holdings in *Leon*, *Krull*, and *Evans*.⁵⁰ Acting on a quashed arrest warrant that police in a neighboring county had negligently left active in a police database, an officer arrested a suspect and found contraband on him.⁵¹ Although police negligence caused the violation, a fact that might distinguish the case from *Arizona v. Evans*, two factors convinced the Court that the good-faith exception should still apply: first, the error was negligent, not reckless or intentional, and second, the negligence was “attenuated” from the Fourth Amendment violation.⁵²

Although the *Herring* holding could be read narrowly—a holding limited to administrative error, for example—the Court’s language suggests a broader application:

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.⁵³

that the exclusionary rule will bar evidence in cases in which police rely on those statutes. *Id.* at 351–52.

⁴⁹ *Arizona v. Evans*, 514 U.S. 1, 15–16 (1995). As in *Leon*, the fault lay with an employee of the courts, not with law enforcement personnel, so the same rationale applied. *See id.* at 14–15.

⁵⁰ *See* Wayne R. LaFare, *The Smell of Herring: A Critique of the Supreme Court’s Latest Assault on the Exclusionary Rule*, 99 J. CRIM. L. & CRIMINOLOGY 757, 758, 787 (2009) (noting that “the stage has been set for a more broad-ranging assault on the exclusionary rule”). *But see* Orin Kerr, *Responding to Tom Goldstein on Herring*, VOLOKH CONSPIRACY (Jan. 14, 2009, 2:38 PM), <http://volokh.com/posts/1231961926.shtml> (calling *Herring* “a narrow and interstitial decision”).

⁵¹ *Herring v. United States*, 555 U.S. 135, 137 (2009).

⁵² *Id.* at 144. Notably, the Court accepted the Eleventh Circuit’s finding that the arresting officers had not been negligent. *Id.* at 138–39.

⁵³ *Id.* at 144. Some commentators have argued that the breadth and vagueness of the language in *Herring* has led to undesirable extensions in the lower courts. *See* Claire Angelique Nolasco et al., *What Herring Hath Wrought: An Analysis of Post-Herring Cases in the Federal Courts*, 38 AM. J. CRIM. L. 221, 252 (2011) (demonstrating that “federal courts have applied the *Herring* good-faith exception to police searches and seizures that involved facts substantially dissimilar from those in *Herring*”).

This language offered the strongest hint yet that the Court intended to protect wide swaths of negligent police action through application of the good-faith exception. How wide these swaths are remains unclear.⁵⁴ The Court has not defined “recurring or systemic negligence,” though it suggested the possibility in *Herring* that a sufficiently error-ridden police database might have led to a different outcome.⁵⁵ Nor has the Court conclusively established that negligence must be recurring or systemic in order to lead to exclusion. The Court’s additional attention to the attenuated nature of the negligence in *Herring*, committed as it was by police in a different county from the arresting officers, suggests that negligence closer to the violation might also bar the good-faith exception.

D. *The Davis Decision: Does It Mean What It Says?*

The most recent “good-faith” case, *Davis v. United States*, produced both an unsurprising outcome as well as the Court’s strongest anti-exclusionary rule rationale.⁵⁶ Although the facts of the case are simple, the legal issue requires some background.

1. *Searching on What Authority?: Factual and Procedural Background*

In a 2007 traffic stop, police arrested Stella Owens, who was driving drunk, and her passenger, Willie Davis, who offered police a false name.⁵⁷ After handcuffing Owens and Davis and placing them in patrol cars, the police searched the car and found a handgun belonging to Davis, a weapon he could not carry legally because he was a convicted felon.⁵⁸ At trial the court denied Davis’s motion to suppress the weapon, citing *Gonzalez*,⁵⁹ an Eleventh Circuit case interpreting the Supreme Court’s decision in *New York v. Belton*.⁶⁰

⁵⁴ See, e.g., Josephson, *supra* note 3, at 203 (concluding that “the contours of the exclusionary rule are not exactly clear post-*Herring*”); LaFave, *supra* note 50, at 770 (calling *Herring* a “scary” decision because its rationale “far outruns the holding”).

⁵⁵ *Herring*, 555 U.S. at 146; see also Erin Murphy, *Databases, Doctrine & Constitutional Criminal Procedure*, 37 FORDHAM URB. L.J. 803, 820 (2010) (reviewing Supreme Court criminal procedure cases involving databases and concluding that the Court has failed “to articulate a consistent vision of the constitutional significance” of police databases).

⁵⁶ *Davis v. United States*, 131 S. Ct. 2419 (2011); see also Dery III, *supra* note 20, at 2 (“While the Court’s ultimate holding might seem unremarkable, its rationale was agitated and alarming.”).

⁵⁷ *Davis*, 131 S. Ct. at 2425.

⁵⁸ *Id.* at 2425–26.

⁵⁹ *United States v. Gonzalez*, 71 F.3d 819, 827 (11th Cir. 1996).

⁶⁰ *New York v. Belton*, 453 U.S. 454, 459–60 (1981). In *Belton*, the Supreme Court had held that a police officer arresting four unrestrained occupants of a vehicle could search the vehicle’s interior. *Id.* at 460.

In *Gonzalez*, the Eleventh Circuit interpreted *Belton* to authorize police to search a vehicle when making a traffic arrest, even after the vehicle's occupants are fully restrained.⁶¹ Under *Gonzalez*—a precedent binding on the officers in *Davis* at the time of the arrest—the officers who arrested Davis had reason to believe they could lawfully search the vehicle.⁶² However, in 2009, two years after Davis's arrest, the Supreme Court abrogated *Gonzalez* when it decided *Arizona v. Gant*.⁶³ Applying *Gant* retrospectively to Davis's arrest, the Eleventh Circuit held that police officers violated Davis's Fourth Amendment rights by searching the vehicle while he and Owens were restrained. Despite the violation, the court held that the good-faith exception should apply because the arresting officers could have relied on the *Gonzalez* precedent. The gun was admitted into evidence despite being obtained in violation of the Fourth Amendment.⁶⁴

2. The Majority Decision

The Supreme Court had no trouble affirming and holding that “searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule.”⁶⁵ In one sense the decision seems unsurprising, as it simply extends the principle of the *Leon* line of cases: to the best of their knowledge, police officers following binding appellate precedent are acting lawfully.⁶⁶ What makes *Davis* notable is the breadth of its rationale and its apparent confirmation that the Court in *Herring* meant what it said.⁶⁷

Much of the Court's rationale in *Davis* sounds as though it is creating an entirely new standard for applying the exclusionary rule. The Court first

⁶¹ *Gonzalez*, 71 F.3d at 822, 824–27.

⁶² *Davis*, 131 S. Ct. at 2426. In dissent, Justice Breyer noted that although the parties agreed in *Davis* that *Gonzalez* constituted binding judicial precedent, “future litigants will be less forthcoming” and courts will have to struggle with difficult questions of what precedent is “binding.” *Id.* at 2437 (Breyer, J., dissenting). The emerging lower court case law certainly bears out this prediction. *See, e.g.*, *United States v. Debruhl*, 38 A.3d 293, 302 (D.C. Cir. 2012) (on rehearing, rejecting its own pre-*Davis* decision to exclude evidence and holding instead that binding appellate precedent justified police action).

⁶³ 556 U.S. 332 (2009). *Gant* limited *Belton* by allowing police to search a vehicle only when the occupants were unrestrained and in reaching distance of the vehicle. *Id.* at 343.

⁶⁴ *United States v. Davis*, 598 F.3d 1259, 1263–64 (11th Cir.), *cert. granted*, 131 S. Ct. 502 (2010), and *aff'd*, 131 S. Ct. 2419 (2011).

⁶⁵ *Davis*, 131 S. Ct. at 2423–24.

⁶⁶ In this respect the officers in *Davis* resemble the officers in *Leon* who were executing a warrant; the officers in *Krull* who were acting in accordance with state statutes; the officers in *Evans* who were carrying out a warrant that was faulty because of a court's clerical error; and even the officers in *Herring* who were carrying out a warrant that was faulty because of a clerical error by police officers in another county. *See supra* Part II.B–C.

⁶⁷ *See* Bradley, *supra* note 23, at 2–3 (*Davis* “made it seem unlikely that *Herring* might be limited to its narrow holding”); Dery III, *supra* note 20, at 27 (“The *Davis* Court . . . ironically, repeated and expanded on the ‘broad dicta’ in *Herring* to further marginalize the exclusionary rule.”).

attempts to lay to rest any remaining notion from its prior cases that the rule is "a self-executing mandate implicit in the Fourth Amendment."⁶⁸ Casting exclusion as a "bitter pill" for society, the Court grants it a very limited role: "The rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations."⁶⁹ More significant, though, are the Court's statements on weighing the benefits of deterrence:

The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion "var[y] with the culpability of the law enforcement conduct" at issue. When the police exhibit "deliberate," "reckless," or "grossly negligent" disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. But when the police act with an objectively "reasonable good-faith belief" that their conduct is lawful, or when their conduct involves only simple, "isolated" negligence, the "deterrence rationale loses much of its force," and exclusion cannot "pay its way."⁷⁰

This is a surprisingly broad characterization of a line of cases featuring only one example, *Herring*, of negligence by law enforcement.⁷¹

3. Concurring and Dissenting Opinions

As the concurring and dissenting opinions in *Davis* recognized, the majority opinion left questions unanswered about the scope of the exclusionary rule and the good-faith exception. Justice Breyer, joined by Justice Ginsburg, dissented on multiple grounds. First, granting the good-faith exception in *Davis* defeats the purpose of the Court's retroactivity doctrine,⁷² which in certain situations applies new constitutional rules to pending cases.⁷³ While *Davis* can

⁶⁸ *Davis*, 131 S. Ct. at 2427; see *supra* Part II.A.

⁶⁹ *Davis*, 131 S. Ct. at 2426–27.

⁷⁰ *Id.* at 2427–28 (citations omitted). As Professor Bradley has pointed out, *Davis* does not offer a single clear test for good faith in this passage. Bradley, *supra* note 23, at 9. Objectively reasonable belief in the lawfulness of one's act implies a lack of negligence, but the court suggests that some negligence—that which is "simple" and "isolated"—will also receive good-faith protection. *Id.*

⁷¹ One commentator points out that "[a]lthough technically *Davis*'s reaffirmation of the culpability demand may also be dictum, it is dead serious dictum." Tomkovicz, *supra* note 20, at 395.

⁷² *Davis*, 131 S. Ct. at 2437 (Breyer, J., dissenting).

⁷³ See *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) (holding that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final"). In Justice Breyer's view, little can come of recognizing a past constitutional violation if the victim of the violation cannot obtain a remedy. *Davis*, 131 S. Ct. at 2437 (Breyer, J., dissenting); see also Orin S. Kerr, *Fourth Amendment Remedies and Development of the Law: A Comment on Camreta v. Greene and Davis v. United States*, 2011 CATO SUP. CT. REV. 237, 252–53; Kerr, *supra* note 29, at 1082

retroactively challenge the search and establish its unconstitutionality, he is denied the exclusionary remedy. Second, Breyer raised the practical problem of asking police officers to perform legal analysis to determine what precisely constitutes “binding” precedent.⁷⁴

In her concurring opinion, Justice Sotomayor sought to emphasize the narrowness of the *Davis* ruling, arguing that the case relied on the existence of binding precedent and did not determine “whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled.”⁷⁵ In such a case, where appellate precedent does not clearly authorize a police activity, Sotomayor suggests that the application of the good-faith exception must await further case development.⁷⁶ The major looming questions are, first, whether the lower courts or the Supreme Court should take charge of this development, and, second, what principles should guide the courts in their decision making.

III. A CASE STUDY IN THE GOOD-FAITH EXCEPTION: *UNITED STATES V. JONES*

In early 2012, the Supreme Court decided *United States v. Jones*,⁷⁷ setting the stage for lower courts to begin answering the questions posed by Breyer and Sotomayor. In 2005, joint state and federal investigators acquired a warrant to install a GPS tracking device on a Jeep driven by Antoine Jones, whom they suspected of drug trafficking.⁷⁸ The investigators acted outside the scope of their warrant, installing the device while it was parked in a public lot and tracking the vehicle’s movements for twenty-eight days.⁷⁹ The Supreme Court held that the installation of a GPS device is a search under the Fourth Amendment.⁸⁰

(arguing that the exclusionary rule plays a critical role in the development of Fourth Amendment law).

⁷⁴ *Davis*, 131 S. Ct. at 2437 (Breyer, J., dissenting).

⁷⁵ *Id.* at 2435 (Sotomayor, J., concurring).

⁷⁶ *Id.* at 2436 (“[W]hether exclusion would result in appreciable deterrence in the circumstances of this case is a different question from whether exclusion would appreciably deter Fourth Amendment violations when the governing law is unsettled.”).

⁷⁷ 132 S. Ct. 945 (2012).

⁷⁸ *Id.* at 948.

⁷⁹ *Id.* Because the Court decided the case on the basis of a trespass theory, *id.* at 949, it did not need to reach the question of whether a four-week period of monitoring violated Jones’s reasonable expectation of privacy. *Id.* at 953–54.

⁸⁰ *Id.* at 954. The government argued that no warrant was required even if it was a search, but the Court held that the government had forfeited this argument below. *Id.* Although the Court’s trespass theory for holding the GPS installation to be a search garnered five votes, the four Justices concurring in the judgment found the rationale implausibly outdated. *See id.* at 957 (Alito, J., concurring in the judgment) (noting the oddity of applying eighteenth-century tort law to twenty-first-century technology).

In the wake of *Jones*, several criminal defendants have filed motions to suppress evidence that was acquired through warrantless GPS surveillance conducted prior to *Jones*.⁸¹ The facts of these cases tend to follow a common pattern. In each case, police identify a suspect, usually someone believed to be participating in ongoing criminal activity, such as a string of burglaries.⁸² Without a warrant, police then attach a GPS device to the suspect's automobile.⁸³ After a period of time, which may range from a few days to more than a year, police rely on the GPS data to make an arrest.⁸⁴ The defendant seeks to suppress evidence acquired as a result of the monitoring, and while the case is still pending, the Supreme Court hands down *United States v. Jones*, rendering the warrantless GPS usage unconstitutional. The stage is set: the defendant now has an apparently winning Fourth Amendment claim.⁸⁵ But does he have a remedy? Will the court suppress the illegally obtained evidence?

In cases in which binding appellate precedent existed in the jurisdiction at the time of the challenged search, lower courts have had little trouble applying *Davis* to admit the evidence.⁸⁶ For example, before *Jones*, the Seventh, Eighth, and Ninth Circuits had specifically authorized police officers to install GPS devices on vehicles in at least some cases without a warrant.⁸⁷ These pre-*Jones* cases were binding circuit precedent at the time of the search, so challenges to

⁸¹ See *supra* notes 21–22.

⁸² *United States v. Katzin*, No. 11–226, 2012 WL 1646894, at *1 (E.D. Pa. May 9, 2012).

⁸³ In *Katzin*, FBI agents attached a GPS device to the exterior of the defendant's Dodge Caravan while it was parked on a Philadelphia street. *Id.* at *2.

⁸⁴ The GPS surveillance in *Katzin* lasted just two days before connecting the defendants with the burglary of a Rite-Aid pharmacy and leading to an arrest. *Id.* By contrast, the monitoring in *United States v. Baez* lasted 347 days. *United States v. Baez*, 878 F. Supp. 2d 288, 292 (D. Mass. 2012). Because *Jones* did not base its holding on reasonable expectations of privacy, the effect of the length of monitoring remains an open question. *Jones*, 132 S. Ct. at 954 (explaining that “there is no reason for rushing forward to resolve” the difficult questions of how GPS surveillance affects privacy expectations).

⁸⁵ See *Katzin*, 2012 WL 1646894, at *7.

⁸⁶ District court cases finding binding appellate precedent in the Seventh and Ninth Circuits include: *United States v. Smith*, No. 2:11-CR-00058-GMN, 2012 WL 4898652 (D. Nev. Oct. 15, 2012); *United States v. Nwobi*, No. CR10–952(C) GHK–7, 2012 WL 769746, at *3 (C.D. Cal. Mar. 7, 2012). In the Eighth Circuit: *United States v. Barraza–Maldonado*, 879 F. Supp. 2d 1022, 1030 (D. Minn. 2012); *United States v. Amaya*, 853 F. Supp. 2d 818, 830 (N.D. Iowa 2012), *partially withdrawn on other grounds*, 853 F. Supp. 2d 835 (N.D. Iowa 2012).

⁸⁷ The Ninth and Seventh Circuits had held that installing and monitoring GPS devices on vehicles did not constitute a Fourth Amendment search. *United States v. Pineda–Moreno*, 591 F.3d 1212, 1216–17 (9th Cir. 2010) (surveillance in public places is not a search); *United States v. Garcia*, 474 F.3d 994, 998 (7th Cir. 2007) (targeted GPS surveillance of a suspect is not a search). The Eighth Circuit had held that it was a search but could be justified by reasonable suspicion. *United States v. Marquez*, 605 F.3d 604, 609 (8th Cir. 2010). Only the D.C. Circuit had held that GPS tracking constituted a search and required a warrant. *United States v. Maynard*, 615 F.3d 544, 560 (D.C. Cir. 2010).

GPS searches in these circuits have foundered on the good-faith exception. The only real question arising in these binding-precedent cases is whether particular precedents have facts similar enough to the challenged action to qualify as “binding” under *Davis*.⁸⁸ Fundamentally, though, cases in these circuits represent straightforward applications of the *Davis* good-faith exception.

A more difficult question is how lower courts should apply the good-faith exception when police officers lacked binding appellate precedent at the time of the Fourth Amendment violation. Two general responses have emerged. On the one hand are courts that read *Davis* narrowly on its facts.⁸⁹ When police lack binding appellate precedent, these courts argue, the exclusionary rule should apply as usual. On the other hand, a number of courts have seized on the Supreme Court’s broad rationale, which suggests that lower courts should exclude evidence only when police are highly culpable.⁹⁰ Even in the absence of binding precedent, these courts hold, police actions may lack the culpability necessary to require exclusion. An analysis of the decisions and rationales of these lower courts can help to shed light on the current state of the exclusionary rule and the good-faith exception.⁹¹

A. The Narrow View: Restricting *Davis* to Binding Appellate Precedent

Courts adopting the narrow view of *Davis* have marshaled a number of arguments in favor of restricting the case closely to its facts. These arguments may be summarized as follows: (1) *Davis* repeatedly emphasizes the importance of binding precedent, not just any precedent;⁹² (2) the *Leon* line of good-faith cases, including *Davis*, authorizes police action that relies on binding law, and no case has authorized an officer’s reliance on nonbinding law;⁹³ (3) the cost-benefit analysis required by the Supreme Court actually recommends limiting police reliance to binding judicial precedent;⁹⁴ (4) allowing reliance on nonbinding precedent threatens to freeze the development of Fourth Amendment law;⁹⁵ and (5) a bright-line binding-precedent rule provides clarity

⁸⁸ Compare *United States v. Andres*, 703 F.3d 828 (5th Cir. 2013) (treating analogous “beeper” case as binding precedent), and *United States v. Rosas-Illescas*, 872 F. Supp. 2d 1320 (N.D. Ala. 2012) (finding 1981 Fifth Circuit case on beepers to be binding precedent), with *United States v. Lujan*, No. 2:11CR11-SA, 2012 WL 2861546, at *3 (N.D. Miss. July 11, 2012) (finding no Fifth Circuit case to be binding precedent for GPS installations).

⁸⁹ See *supra* note 21.

⁹⁰ See *supra* note 22.

⁹¹ Although Professor Mason has offered a valuable framework for analyzing these post-*Jones* cases, Mason, *supra* note 27, at 73, the subsequent case law has shown that lower courts have so far found the broad view more appealing than he anticipated. *Id.* at 79–80.

⁹² E.g., *United States v. Ortiz*, 878 F. Supp. 2d 515, 539–40 (E.D. Pa. 2012).

⁹³ See, e.g., *United States v. Lee*, 862 F. Supp. 2d 560, 568–69 (E.D. Ky. 2012).

⁹⁴ See *Ortiz*, 878 F. Supp. 2d at 542.

⁹⁵ See *United States v. Robinson*, 903 F. Supp. 2d 766, 784 (E.D. Mo. 2012) (predicting that extending *Davis* “would further undermine the Court’s decisions on retroactive application of a new rule”).

for law enforcement.⁹⁶ The courts have developed these arguments in a number of ways.

The first defense of the narrow view of *Davis* relies on the restricting language of the opinion. Several courts have argued that the Court in *Davis* goes out of its way to emphasize that the existence of binding precedent is critical to the holding.⁹⁷ For example, the Court refers more than a dozen times to “binding” precedent, not to “persuasive” precedent or some broader formulation.⁹⁸ Moreover, the Supreme Court says that the officers in *Davis* acted “in strict compliance” with binding precedent,⁹⁹ that they followed that precedent “to the letter,”¹⁰⁰ and that the precedent “specifically authorize[d] a particular police practice.”¹⁰¹ As one district court has noted,¹⁰² the majority opinion in *Davis* even admits that “defendants in jurisdictions in which [a Fourth Amendment] question remains open will still have an undiminished incentive to litigate the issue”¹⁰³ even after a number of circuit courts or state supreme courts have ruled on it. If this is correct, and defendants will indeed retain an incentive to litigate open issues, it must be because persuasive authority cannot entirely determine the application of the good-faith exception in other jurisdictions. Such narrowing language throughout the opinion has convinced some district courts that *Davis* should not be read to extend the good-faith exception to officers’ reliance on nonbinding precedent.¹⁰⁴

A second argument for the narrow view focuses on binding law as the common element in the *Leon* line of good-faith cases.¹⁰⁵ The district court in *United States v. Lee*, for example, determined that “the good-faith exception does not apply whenever police officers believe they are following the law,” because good faith is a legal term of art meaning objectively reasonable.¹⁰⁶ The

⁹⁶ *Lee*, 862 F. Supp. 2d at 570.

⁹⁷ *Ortiz*, 878 F. Supp. 2d at 540 (“The Supreme Court emphasized that the agents had acted exactly in accordance with *Gonzalez*, the applicable circuit court case . . .”); see also *Robinson*, 903 F. Supp. 2d at 784 (“The language of *Davis* is narrow, and quite specific.”).

⁹⁸ *Ortiz*, 878 F. Supp. 2d at 539–40 (collecting references in *Davis*).

⁹⁹ *Davis v. United States*, 131 S. Ct. 2419, 2428 (2011).

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 2429. The district court in *Ortiz* relied on this language to argue that a precedent must be directly on point to be binding. *Ortiz*, 878 F. Supp. 2d at 540–41. For this reason, *Ortiz* rejected the Supreme Court’s “beeper” cases—*United States v. Karo*, 468 U.S. 705, 713 (1984); *United States v. Knotts*, 460 U.S. 276, 285 (1983)—as binding precedent for GPS installations. *Ortiz*, 878 F. Supp. 2d at 541. Those two cases did not address the trespass theory the Supreme Court relied on in *Jones*, nor did they “specifically authorize” the use of GPS technology when the technologies differ significantly. *Id.*

¹⁰² See *Robinson*, 903 F. Supp. 2d at 784.

¹⁰³ *Davis*, 131 S. Ct. at 2433. Precisely because the use of nonbinding precedent threatens to reduce this incentive, some district courts have objected to the broad view. See, e.g., *Robinson*, 903 F. Supp. 2d at 784.

¹⁰⁴ *Ortiz*, 878 F. Supp. 2d at 540; accord *Mason*, *supra* note 27, at 69.

¹⁰⁵ See *supra* Part II.B.

¹⁰⁶ *United States v. Lee*, 862 F. Supp. 2d 560, 568 (E.D. Ky. 2012).

best way to determine what that phrase means is to see how the Supreme Court has applied it.¹⁰⁷ The rule the *Lee* court saw emerging from the *Leon* line of cases, including *Davis*, is that police action is objectively reasonable “only when an (ultimately incorrect) legal authority approved of the officers’ actions.”¹⁰⁸ This view of the good-faith exception obviates the need for an analysis of officer culpability, for police action taken with legal authority is not culpable and requires no deterrence.¹⁰⁹ However, deterrence plays a very different role when a police officer lacks clear legal authority. In such a case, the officer “is guessing at what the law might be, rather than relying on what a binding legal authority tells him it is.”¹¹⁰

Similarly, the district court in *United States v. Ortiz* chose to view some of the broader *Davis* language as “dicta that must be read in context.”¹¹¹ In *Ortiz*, the government argued that *Davis* stands for the proposition that officers need not rely on binding appellate precedent so long as their illegal behavior was not deliberate, reckless, or grossly negligent.¹¹² According to the district court, however, this language of culpability does not state a rule; rather, it explains why strict compliance with binding appellate precedent deserves the application of the good-faith exception.¹¹³ In both *Lee* and *Ortiz*, then, the courts play down the relevance of the broad rationale of *Davis* by focusing on the existence of binding law in the form of judicial precedent.

A third argument for applying *Davis* narrowly appeals to the basic cost-benefit analysis underlying the Supreme Court’s current understanding of the

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*; see also *Robinson*, 903 F. Supp. 2d at 785 (holding an officer’s reasonable but erroneous belief that nonbinding precedent justifies her action falls outside the bounds of the good-faith exception as defined by the *Leon* line); *United States v. Katzin*, No. 11–226, 2012 WL 1646894, at *9 (E.D. Pa. May 9, 2012) (declining to extend *Davis* to nonbinding precedent because the *Leon* cases “generally involve reliance on unequivocally binding legal authority”).

¹⁰⁹ *Lee*, 862 F. Supp. 2d at 568.

¹¹⁰ *Id.* at 569. *Lee* does not go so far as to suggest that this guessing constitutes negligence, but at least one other court has suggested as much. See *Katzin*, 2012 WL 1646894, at *9.

¹¹¹ *United States v. Ortiz*, 878 F. Supp. 2d 515, 541 (E.D. Pa. 2012). Both *Katzin* and *Ortiz* apparently assume that the exclusionary rule applies by default. This assumption is in apparent tension with statements by the Third Circuit Court of Appeals suggesting that district courts should perform a cost-benefit analysis of the costs of exclusion versus the benefits of deterrence before applying the exclusionary rule in the first place. See *United States v. Wright*, 493 F. App’x 265, 271 (3d Cir. 2012); *Virgin Islands v. John*, 654 F.3d 412, 417–18 (3d Cir. 2011).

¹¹² *Ortiz*, 878 F. Supp. 2d at 541. At the time the agents acted in *Ortiz*, four courts of appeals had specifically addressed the question of GPS installation. *Id.* at 538; see also *supra* note 87.

¹¹³ See *Ortiz*, 878 F. Supp. 2d at 541; see also *Robinson*, 903 F. Supp. 2d at 783–84 (rejecting the notion that *Davis* requires lower courts “to engage in a free-ranging balancing test [of costs and benefits] in the absence of controlling Supreme Court or Circuit authority”).

exclusionary rule. Recall that to exclude evidence obtained by means of a constitutional violation, a court must ultimately find that the deterrence benefits of exclusion outweigh the costs of letting criminals go free.¹¹⁴ The court in *Ortiz* held that in a case with nonbinding precedent only, the deterrence benefits of exclusion outweigh the costs because exclusion deters police officers from making guesses about the state of the law and how they should apply it.¹¹⁵ In the words of another district court, “suppression might deter the officer who picks and chooses which law he wishes to follow.”¹¹⁶ At least on the facts in *Ortiz*, in which application for a warrant “would not have impaired or delayed the investigation in any way,” the court held that the benefits of exclusion outweighed the costs.¹¹⁷ Another court’s even more striking version of the cost–benefit argument urges that a system in which officers review nonbinding precedent and make their best guess about what practices are legal would “at least border[] on being categorized as systemic negligence.”¹¹⁸ Extending *Davis* to nonbinding precedent, the court suggests, might actually encourage police activity that the exclusionary rule exists to deter.

The final two arguments for restricting *Davis* to cases of binding precedent appear only in passing in the lower court opinions. One suggests that allowing police to rely on nonbinding precedent will stunt the development of Fourth Amendment law in jurisdictions with unsettled law.¹¹⁹ In his *Davis* dissent, Justice Breyer worried about the closely related problem of nonretroactivity: under the majority decision, defendants will often find themselves with a right to retroactive application of new law but with no remedy.¹²⁰ As Professor Kerr has argued, in such circumstances defendants lose the incentive to raise suppression challenges, and courts will not hear arguments from parties most interested in maintaining strong Fourth Amendment protections.¹²¹ A final

¹¹⁴ *Supra* note 41 and accompanying text.

¹¹⁵ *Ortiz*, 878 F. Supp. 2d at 541–42.

¹¹⁶ *United States v. Lee*, 862 F. Supp. 2d 560, 569 (E.D. Ky. 2012).

¹¹⁷ *See Ortiz*, 878 F. Supp. 2d at 541–42; *see also United States v. Katzin*, No. 11–226, 2012 WL 1646894, at *9 (E.D. Pa. May 9, 2012) (allowing police to rely on nonbinding precedent “would encourage law enforcement to beg forgiveness rather than ask permission in ambiguous situations involving the basic civil rights”). Notably, however, the *Katzin* court gave particular consideration to the fact that disagreement existed among the circuits, leaving open the possibility that the court might have applied the good-faith exception if nonbinding precedent had unanimously authorized the GPS monitoring. *Id.*

¹¹⁸ *Katzin*, 2012 WL 1646894, at *9. In dicta in the *Herring* decision, the Supreme Court suggested that “systemic negligence” by law enforcement might defeat the application of the good-faith exception. *See Herring v. United States*, 555 U.S. 135, 144 (2009); *United States v. Swearingen*, No. CR 12–26–M–DLC, 2013 WL 174479, at *8 (D. Mont. Jan. 8, 2013) (denying the good-faith exception on grounds of “recurring and/or systemic negligence” when police on two occasions unconstitutionally seized defendant’s computer).

¹¹⁹ *See United States v. Robinson*, 903 F. Supp. 2d 766, 784 (E.D. Mo. 2012).

¹²⁰ *See supra* note 73.

¹²¹ *See Kerr, supra* note 29, at 1092 (“Without an exclusionary rule for new law, defendants will have no reason to ask courts to change the law to help them.”). Professor Kerr also contributed to *Davis*’s briefs in the Supreme Court, and the arguments focused on

argument raised in favor of restricting *Davis* to cases of binding precedent points out the practicality of the interpretation. The narrow view creates a clear, administrable rule for law enforcement officers: rely on decisions of the United States Supreme Court, your own federal circuit court, or your state supreme court.¹²² Opening the door to nonbinding precedent admits a host of difficult questions, such as how many courts of appeals have to authorize a practice, whether district court decisions matter, and how to deal with disagreement among persuasive opinions.¹²³ Binding appellate precedent is a far clearer guide for police officers than a rule allowing them to consider nonbinding precedent as well.¹²⁴

The narrow-view courts have uniformly suppressed evidence in cases lacking binding appellate precedent. This fact reflects the common thread running through these cases: a background assumption that the exclusionary rule should apply by default when police officers acquire evidence in violation of the Constitution.¹²⁵ From this default rule, the good-faith exception simply carves out particular circumstances—reliance on warrants, statutes, binding precedents—where exclusion has no role to play. These courts are content to leave it to the Supreme Court to extend the exception to new facts, such as to a reliance on nonbinding precedent.

B. *The Broad View: Nonbinding Precedent and Culpability Analysis*

A number of lower courts have not felt so constrained by the language of “binding appellate precedent” in *Davis*. Instead, these courts tend to treat the rule as merely a specific application of a much broader principle of culpability. One way to state that principle, in *Davis*’s words, is that evidence should be excluded only if police “exhibit deliberate, reckless, or grossly negligent

the problem of retroactivity. See Brief for Petitioner at 7–9, *Davis v. United States*, 131 S. Ct. 2419 (2011) (No. 09-11328); Reply Brief for Petitioner at 3–7, *Davis*, 131 S. Ct. 2419 (No. 09-11328); see also Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 60–61 (1965) (describing the troubling incentives generated by remedies with purely prospective effect).

¹²² See *United States v. Lee*, 862 F. Supp. 2d 560, 570 (E.D. Ky. 2012). A relatively unexplored issue in this area is the interplay between state and federal law. See, e.g., LAFAYE, *supra* note 23, § 1.3(h) (noting that “an equivalent basis for [good-faith] reliance at both the federal and state level is not inevitable, meaning the *Davis* approach can produce added mischief”).

¹²³ *Lee*, 862 F. Supp. 2d at 570; see also *Katzin*, 2012 WL 1646894, at *9. Justice Breyer raised similar concerns in his *Davis* dissent with respect to the question of what constitutes “binding precedent.” See *Davis*, 131 S. Ct. at 2437 (Breyer, J., dissenting).

¹²⁴ See *Lee*, 862 F. Supp. 2d at 570.

¹²⁵ The assumption does not always remain in the background: the court in *Katzin* explicitly rejected the broad view of *Davis* because going “beyond the strict *Davis* holding sharpens the instruments that can effectively eviscerate the exclusionary rule entirely.” *Katzin*, 2012 WL 1646894, at *9.

disregard for Fourth Amendment rights.”¹²⁶ A different formulation, from the next sentence in *Davis*, says that “when the police act with an objectively reasonable good-faith belief that their conduct is lawful, or when their conduct involves only simple, isolated negligence, the deterrence rationale loses much of its force, and exclusion cannot pay its way.”¹²⁷

Appealing to one or both of these principles, a growing majority of lower courts have developed arguments in favor of a broad interpretation of *Davis* that encompasses consideration of nonbinding precedent. The central argument is that *Davis* and the rest of the *Leon* line of cases justify their holdings with a cost-benefit analysis that determines the deterrence benefits of exclusion by analyzing police culpability. Because the Supreme Court has provided this test for the good-faith exception, the lower courts should apply it to new fact patterns as they arise rather than feeling bound by the strict holdings of the Court’s cases. Lower courts also argue that the narrow approach threatens to inhibit the development of new police procedures.

Most of the broad-view courts have seen themselves as accepting the obvious import of *Davis*.¹²⁸ In *United States v. Leon* (not to be confused with the Supreme Court case), for example, the district court recognized that no binding appellate precedent supported the officers’ actions and that “*Davis* therefore is not directly controlling on this issue.”¹²⁹ Nonetheless, to establish the effect of nonbinding precedent, the court immediately turned to the *Davis* rationale for its test: “whether the agents exhibited ‘deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights’ or whether they acted ‘with an objectively reasonable good-faith belief that their conduct [was] lawful.’”¹³⁰ So even when *Davis* does not control, the court decided, its culpability rationale should drive a lower court’s analysis. In the words of another district court, “the relevant inquiry is not whether the precedent upon

¹²⁶ *Davis*, 131 S. Ct. at 2427 (internal quotation marks omitted).

¹²⁷ *Id.* at 2427–28 (citations omitted) (internal quotation marks omitted). These formulations are not two sides of a coin. Between objective reasonableness and gross negligence lies ordinary negligence, a vast territory of potential police behavior that the Supreme Court has scarcely dealt with in its good-faith exception cases. See *Herring v. United States*, 555 U.S. 135, 137 (2009) (police negligence “attenuated” from the constitutional violation does not bar the good-faith exception).

¹²⁸ See *United States v. Batista*, No. 5:12cr11, 2013 WL 782710, at *6 (W.D. Va. Feb. 28, 2013); *United States v. Fisher*, Nos. 2:10-cr-28, 2:10-cr-32, 2013 WL 214379, at *2 (W.D. Mich. Jan. 18, 2013); *United States v. Guyton*, No. 11-271, 2013 WL 55837, at *5 (E.D. La. Jan. 3, 2013); *United States v. Ford*, No. 1:11-CR-42, 2012 WL 5366049, at *11 (E.D. Tenn. Oct. 30, 2012); *United States v. Rose*, 914 F. Supp. 2d 15, 24 (D. Mass. 2012); *United States v. Lopez*, 895 F. Supp. 2d 592, 605 (D. Del. 2012); *United States v. Baez*, 878 F. Supp. 2d 288, 294 (D. Mass. 2012); *United States v. Leon*, 856 F. Supp. 2d 1188, 1193 (D. Haw. 2012).

¹²⁹ *Leon*, 856 F. Supp. 2d at 1193.

¹³⁰ *Id.* (quoting *Davis*, 131 S. Ct. at 2427).

which officers rely is legally binding but whether it was objectively reasonable to rely on that precedent.”¹³¹

Once a court decides that it can consider nonbinding precedent in a culpability analysis, it then faces the question of what kind of reliance deserves good-faith protection. The district court in *United States v. Baez* adopted the rule that when “law enforcement officers at the time they act have a good faith basis to rely upon substantial consensus among precedential courts, suppression of probative evidence is too high a price to pay” when that consensus is overturned.¹³² In *Baez*, this “substantial consensus”¹³³ consisted of three decisions by circuit courts of appeals, all of which agreed that police did not need a warrant to install GPS devices.¹³⁴ This state of the law, offering no hint that the practice might be unconstitutional, gave the officers in *Baez* no reason to doubt the lawfulness of their action. Just three days before the officers in *Baez* stopped using the GPS monitoring,¹³⁵ the D.C. Circuit handed down *United States v. Maynard*, which broke the circuit unanimity by requiring warrants for GPS installation and tracking.¹³⁶ According to *Baez*, the *Maynard* decision created a distinguishable set of circumstances thereafter. *Baez* distinguished *Katzin*—another district court in the First Circuit that had earlier adopted the narrow view of *Davis* and denied the good-faith exception¹³⁷—by pointing to the fact that the officers in *Katzin* installed a GPS device after the *Maynard* decision created a circuit split.¹³⁸ Thus, while the *Baez* officers had no reason to think warrantless GPS devices might be illegal, the *Katzin* officers did have reason because of the circuit split.¹³⁹

¹³¹ *Guyton*, 2013 WL 55837, at *5. The difference between binding and nonbinding precedent becomes relatively unimportant under this reasonableness analysis. In *Guyton*, for example, the court held that police could have reasonably relied on a case in their circuit with loosely similar facts, and that this was so whether or not the court could find that the precedent was in fact controlling. *Id.* at *8.

¹³² *Baez*, 878 F. Supp. 2d at 289.

¹³³ Another district court has offered a similar standard, holding that the good-faith exception applies in cases of “objectively reasonable reliance on a *comprehensive body of case law*,” whether or not that case law is binding. *Rose*, 914 F. Supp. 2d at 22 (emphasis added).

¹³⁴ See *United States v. Marquez*, 605 F.3d 604, 609–10 (8th Cir. 2010); *United States v. Pineda-Moreno*, 591 F.3d 1212, 1216–17 (9th Cir. 2010); *United States v. Garcia*, 474 F.3d 994, 998 (7th Cir. 2007); *United States v. Michael*, 645 F.2d 252, 257 (5th Cir. 1981) (holding that reasonable suspicion may support the warrantless installation of an electronic tracking “beeper”).

¹³⁵ *Baez*, 878 F. Supp. 2d at 293.

¹³⁶ *United States v. Maynard*, 615 F.3d 544, 560 (D.C. Cir. 2010).

¹³⁷ See *supra* note 117.

¹³⁸ See *Baez*, 878 F. Supp. 2d at 296.

¹³⁹ The district court in *United States v. Oladosu* took a very similar approach, finding good faith on the basis of unanimous circuit court holdings, and distinguishing its result from several narrow-view decisions on the ground that the police actions in those cases occurred after the development of the circuit split. *United States v. Oladosu*, 887 F. Supp. 2d 437, 447–48 (D.R.I. 2012). The court even granted some significance to the fact that, in a

In addition to arguing that the narrow, binding-precedent-only view of *Davis* ignores the Supreme Court's rationale, broad-view courts have stressed the possibility that a narrow view would over-deter law enforcement. The court in *United States v. Rose*¹⁴⁰ makes such a point concisely. If officers may not rely on nonbinding precedent, "police in some jurisdictions would be forced to wait decades to implement new technology or risk suppression even where . . . the warrantless use of the technology was universally considered to be constitutionally permissible."¹⁴¹ The alternative for law enforcement, seeking a warrant, "seems unnecessarily unwieldy—and potentially enervating to timely police action."¹⁴²

C. Where the Current Case Law Stands

Without a doubt, the broad-view courts have the wind at their backs with respect to current Supreme Court precedent on the good-faith exception.¹⁴³ Whereas the narrow-view courts are struggling to find a way around the increasingly broad rationales of cases such as *Herring* and *Davis*, broad-view courts accept this rationale as the applicable law and concern themselves mainly with finding the right test to apply to nonbinding precedent. Other themes also emerge from the lower-court cases. First, and most notably, the lower courts are experimenting with a fairly broad range of responses to *Davis*. Although the majority of courts have accepted the broad view and extended the exception into new fact patterns, at least a handful of courts are finding that the Court has not yet demanded or even authorized such an extension.

Also intriguing is the fact that in every case, a lower court's decision to read *Davis* narrowly or broadly correlates with suppression or admission,

Ninth Circuit dissent from denial of rehearing en banc soon after *Maynard*, Judge Kozinski vigorously disputed the constitutionality of GPS installations. *Id.* at 446–47 (citing *Pineda-Moreno*, 617 F.3d at 1123 (Kozinski, J., dissenting from denial of rehearing en banc)). One is inclined to wonder how a legal nuance such as the persuasive effect of a five-person dissent from a denial of rehearing en banc can be said to have put an objectively reasonable officer "on notice" that she needed a warrant. *See id.* It is one thing to assume an objectively reasonable officer is aware of nonbinding circuit court decisions. *See, e.g., United States v. Lopez*, 895 F. Supp. 2d 592, 606–07 (D. Del. 2012) (finding an officer's installation of a GPS device objectively reasonable on the grounds of nonbinding circuit decisions, despite the officer's failure to seek prior legal advice). It is quite another to assume the officer knows of dissenting opinions of any kind.

¹⁴⁰ 914 F. Supp. 2d 15, 23 (D. Mass. 2012).

¹⁴¹ *Id.* Police could restrict the use of such technologies to situations in which they can acquire a warrant, in which case (assuming a facially valid warrant) *Leon* itself would grant the good-faith exception. *United States v. Leon*, 468 U.S. 897, 913 (1984). Of course, this restriction would seriously limit the value of a technology such as GPS early in investigations.

¹⁴² *See Baez*, 878 F. Supp. 2d at 297.

¹⁴³ *See supra* note 20 (listing articles that argue *Davis* significantly curtails the exclusionary rule).

respectively. What this uniformity means is not immediately clear. In the context of cases in which no binding appellate precedent existed, the narrow reading almost certainly disposes of the cases as falling outside the limits of the good-faith exception. But the “objectively reasonable” or “not grossly negligent” analyses of the broad-view courts should not obviously lead to application of the exception in every case. At least some of the broad-view cases involve searches that took place after the circuit split developed over warrantless GPS.¹⁴⁴ It is too soon to conclude on this narrow range of cases that, as some commentators have suggested, a broad reading of *Davis* effectively guts the exclusionary rule.¹⁴⁵ But the evidence from these cases does demonstrate that courts inclined to the broad view have a number of options for finding police action reasonable when there was no binding law authorizing the action. Some examples: on-point but nonbinding precedent from one or more circuits;¹⁴⁶ precedents binding in one’s own jurisdiction that are analogous but not directly on point;¹⁴⁷ and a simple lack of legal authority calling the action into question.¹⁴⁸

IV. SOLUTION: RELIANCE ON “CLEARLY ESTABLISHED” LAW

At least two related but distinct questions emerge from the problem presented above. First, how *should* lower courts interpret *Davis*? The courts disagree on the scope of *Davis* and also, to some extent, on the role lower courts should play in developing questions left unanswered by the Supreme Court. Should the courts limit themselves to a fact-bound reading of the case, or should they embrace and apply the broad principles that justify the Supreme Court’s decision? Much of the district courts’ disagreement revolves around these

¹⁴⁴ E.g., *United States v. Ford*, No. 1:11–CR–42, 2012 WL 5366049, at *11 (E.D. Tenn. Oct. 30, 2012); *Rose*, 914 F. Supp. 2d at 23. In *Rose*, officers installed one of four GPS devices after the D.C. Circuit’s *Maynard* decision created the circuit split. *Id.* *Rose* attempted to downplay the relevance of *Maynard* by noting that another district court case, *United States v. Sparks*, 750 F. Supp. 2d 384, 392, 395 (D. Mass. 2010), had criticized the outcome in *Maynard*. *Rose*, 914 F. Supp. 2d at 23.

¹⁴⁵ E.g., Maclin & Rader, *supra* note 20, at 1189.

¹⁴⁶ E.g., *Ford*, 2012 WL 5366049, at *10 (relying on precedents in the Seventh, Eighth, and Ninth Circuits).

¹⁴⁷ E.g., *United States v. Leon*, 856 F. Supp. 2d 1188, 1193–94 (D. Haw. 2012) (“Although the technology changed, the agents were certainly justified in relying on *Knotts*’ rationale in determining that no warrant was required.”); *Kelly v. State*, 56 A.3d 523, 541 (Md. App. 2012) (holding that *Davis* does not require “that there be a prior appellate case directly on point, i.e., factually the same as the police conduct in question”).

¹⁴⁸ This appears to be the rationale in *People v. Hill*, 829 N.W.2d 908, 915 (Mich. Ct. App. 2013) (granting good-faith exception to police officers who entered defendant’s home on a neighbor’s tip that he might need help). A variation on the theme finds that the search effectively took place in another jurisdiction and applies that jurisdiction’s law as the binding precedent. See *United States v. Shelburne*, 3:11–cr–156–S, 2012 WL 2344457, at *4–5 (W.D. Ky. June 20, 2012) (district court in the Sixth Circuit looked to Seventh Circuit precedent because the investigation had originated there).

questions, which are fundamentally issues of stare decisis.¹⁴⁹ Second, assuming the validity of both approaches, which presents the better solution to the problem? Attempting to answer this question is not necessarily a wasted exercise. As the disagreement among lower courts suggests, *Davis* has left the Supreme Court room to maneuver in future cases.

A. *Clearing the Underbrush: Preliminary Issues of Stare Decisis*

Both the narrow and broad interpretations of *Davis* can claim support from existing theories of stare decisis. On a restrictive theory of precedent that focuses solely on facts and outcome rather than on the Court's explicit rationale,¹⁵⁰ one can read the holding of *Davis* as limited to cases of binding appellate precedent.¹⁵¹ The Court in *Davis* repeatedly refers to the existence of binding appellate precedent as a fact critical to its decision, and such "material facts" establish the breadth of the holding.¹⁵² On the other hand, following a more rationale-based theory of precedent,¹⁵³ a lower court could reasonably accept *Davis*'s rationale regarding "deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights"¹⁵⁴ to bind the lower court to consider whether police culpability rises to this level. While a lower court might plausibly choose either course, the wide gulf between the Supreme Court's factual holdings and the logical consequences of its rationale argues in favor of the narrower, holding-based approach.

The Supreme Court's good-faith holdings, including *Davis*, establish a fairly uncontroversial rule on the narrower reading: when police are relying in good faith on what they reasonably take to be an authoritative statement of their

¹⁴⁹ See Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 4-6 (1994).

¹⁵⁰ For the classic exposition of this view, see Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 162 (1930). In Goodhart's view, the "task in analyzing a case is not to state the facts and the conclusion, but to state the material facts as seen by the judge and his conclusion based on them." *Id.* at 169. Determining which facts are material to the judge's decision allows one to determine the breadth of the holding. See *id.* at 174-75.

¹⁵¹ This view might even understand the holding to cover a police officer's cooperation with any binding law, because the Court compares binding appellate precedent to the existence of a warrant or statute. See *Davis v. United States*, 131 S. Ct. 2419, 2429 (2011).

¹⁵² See *supra* note 97. Instead of focusing on binding appellate precedent, the Court could have formulated a broader rule by basing its holding on the existence of any persuasive precedent that reasonably justifies police behavior. See Goodhart, *supra* note 150, at 169 ("To ignore [the Court's] choice is to miss the whole point of the case.").

¹⁵³ E.g., Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2040 (1994) ("In sum, a commitment to the rule of law and a proper understanding of the source of legitimate authority in our constitutional order will result in a holding/dictum distinction that turns on rationales, not just facts and outcomes.").

¹⁵⁴ *Davis*, 131 S. Ct. at 2427 (internal quotation marks omitted).

legal duties, the inaccuracy of that statement does not require exclusion.¹⁵⁵ So when a legislature or a magistrate makes a mistake about the law, the police are still right to act on that authority until a court corrects it. "Punishing" officers with exclusion of evidence obtained in such a way cannot deter them from future Fourth Amendment violations. But when the mistake of law lies with the officer and not a legislature or magistrate, the deterrence picture looks quite different. Take for instance a police officer who, having received a tip from a citizen, mistakenly believes himself justified in entering a home without a warrant in order to check on the welfare of an occupant.¹⁵⁶ Under a pure culpability analysis, this mistake looks like the kind of "simple, isolated negligence" that *Davis* says does not warrant exclusion.¹⁵⁷ And yet such negligence occurs every day, meaning a broad interpretation of the *Davis* holding would affect a wide array of cases, strongly tilting the balance of the Fourth Amendment away from privacy protection toward aggressive law enforcement.

Setting aside the policy question of whether the exclusionary rule ought to stand or fall, lower courts should not take it upon themselves to extend the good-faith exception to cases of police negligence. For lower courts to make so sweeping a change to the law on the basis of Supreme Court cases decided on very different facts raises the possibility that an overly broad rule will not adequately anticipate new fact scenarios.¹⁵⁸ The more sensible course for a lower court, particularly where a constitutional protection is at stake, is to allow the Court to, as it were, put its ruling where its rationale is. When the right case comes along, the Supreme Court can clarify whether everyday police negligence really deserves the benefit of the good-faith exception.¹⁵⁹ In the meantime, by adopting the approach described below, lower courts could

¹⁵⁵ Professor LaFave acknowledges that *Davis* looks at first glance like a "no brainer," but he argues that the case departs significantly from the rest of the *Leon* line by assuming an officer's "reasonable reliance" on case law rather than requiring an actual showing of reliance. LAFAVE, *supra* note 23, § 1.3(h).

¹⁵⁶ These facts come, slightly modified, from *People v. Hill*, 829 N.W.2d 908, 912 (Mich. Ct. App. 2013). In *Hill*, the court avoided the constitutional question of whether a Fourth Amendment violation had occurred, holding instead that the good-faith exception would apply because "the record establishes that the police officers acted with an objectively reasonable good-faith belief that their conduct was lawful." *Id.* at 915.

¹⁵⁷ *Davis*, 131 S. Ct. at 2427–28 (internal quotation marks omitted).

¹⁵⁸ Of course, sweeping changes to the law become scarcer if lower courts have to wait for the Supreme Court to hear enough cases to drive home a broad principle. After *Brown v. Board of Education*, for example, lower courts extended the Supreme Court's school-desegregation decisions to other public facilities, despite the existence of prior Supreme Court precedent upholding segregation in such institutions. Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the "Judicial Power,"* 80 B.U. L. REV. 967, 976 (2000). One might make a distinction between extending liberties in the desegregation context and curtailing them in the case of Fourth Amendment violations.

¹⁵⁹ For a discussion of the virtues of "judicial minimalism," see CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 259–63 (1999).

continue to apply the exclusionary rule while faithfully following Supreme Court precedent on the good-faith exception.

B. The Proposed “Clearly Established” Standard

Each of the views outlined above, narrow and broad, offers a key insight. The narrow view recognizes that the good-faith exception applies most appropriately when officers are following clear legal authority that, through no fault of their own, turns out to have been mistaken. The broad view recognizes that *Davis* stands for more than the proposition that reliance on binding precedent should receive the benefit of the good-faith exception. The solution suggested here incorporates both of these insights in an effort to accommodate the primary, competing policy concerns of the Fourth Amendment: personal privacy and effective law enforcement. While society wants to encourage police officers to use effective new investigative techniques, it does not want to do so in such a way that officers are constantly invading individual privacy rights.

The nonbinding-precedent situation presents the question of what the state of the law must be in order for an officer to act without culpability. Courts have been answering this question for many years in the context of § 1983¹⁶⁰ actions and the application of qualified immunity. Qualified immunity provides a useful comparison to the good-faith exception because many of the same considerations are involved.¹⁶¹ In essence, the doctrine of qualified immunity shields government officials from suits seeking civil damages when “their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”¹⁶² Courts should look to that doctrine for assistance in applying the good-faith exception to cases involving a lack of binding precedent.¹⁶³

The analysis courts should consider adopting is as follows. When police lack binding legal authority for an action that turns out to violate the Fourth Amendment—i.e., no warrant, statute, or binding appellate precedent authorized

¹⁶⁰ 42 U.S.C. § 1983 (2006) (originally part of the Civil Rights Act of 1871).

¹⁶¹ Professor Laurin has carefully and convincingly traced the role qualified immunity doctrine has played in the development of the good-faith exception to the exclusionary rule. See generally Laurin, *supra* note 28. Her account suggests that this doctrinal borrowing has mainly resulted in the constriction of the exclusionary rule. *Id.* at 744. The method suggested here openly borrows from qualified immunity doctrine, but in such a way as to require greater police attention to legal authority than the qualified immunity doctrine itself does.

¹⁶² *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

¹⁶³ Commentators have recognized the potential for overlap between the two doctrines. See Orin Kerr, *Supreme Court Expands Good-Faith Exception to Exclusionary Rule To Include Reliance on Overturned Law*, VOLOKH CONSPIRACY (June 16, 2011, 10:41 AM), <http://www.volokh.com/2011/06/16/court-expands-good-faith-exception-to-reliance-on-overturned-law/> (“Whether *Davis* applies when the law is merely unclear is the obvious next question: The significant possibility (always in the background during *Davis*) is that the Court may limit the exclusionary rule to the same types of rare cases in which there is no qualified immunity.”). *

the action¹⁶⁴—courts should ask whether the constitutionality of the police action was clearly established when the police acted. Only when the constitutionality of the action was clearly established should the good-faith exception apply.

Note first that this approach modifies the object of the qualified immunity inquiry. That inquiry asks in effect whether the *unconstitutionality* of the police action was clearly established. If the law gave an officer notice that her action would violate a citizen's clearly established constitutional rights, she is not entitled to qualified immunity for acting. In cases of uncertainty, however, where the right was not clearly established and the officer's action might have been constitutional, her actions receive immunity.

By contrast, the analysis suggested for the good-faith exception asks a different question: whether the law has clearly established the constitutionality of a particular police practice. Another way to ask the question is whether the law has clearly established a citizen's *lack* of a constitutional right under certain circumstances. If the law puts the reasonable officer on notice that her action might be unconstitutional, she should refrain. Reasonable uncertainty in this analysis will not provide the officer with good-faith protection, and suppression of illegally obtained evidence will result. This standard keeps the good-faith exception tethered to an officer's compliance with clear legal authority, but it does so in a way that allows law enforcement to adopt new investigative techniques without unreasonable delay.

With respect to nonbinding precedent, this makes the suggested analysis a version of the broad-view approach described above, though it is consistent with the fundamental concerns of many narrow-view courts. In keeping with qualified immunity doctrine, the suggested analysis would allow courts to consider at least some nonbinding precedent¹⁶⁵ as well as binding precedents not directly on point.¹⁶⁶

1. *The Standard in Action: Application to the GPS Cases*

The GPS cases offer a ready test for the application of the proposed standard. A first case demonstrates that the clearly-established standard grows directly out of the *Davis* holding and the Court's line of good-faith cases beginning with *Leon*. In this hypothetical, police in the Ninth Circuit install a GPS device without a warrant. At the time of the installation, police can rely on

¹⁶⁴ This describes the situation in which none of the existing good-faith exceptions applies, including the GPS cases explored in Part III.

¹⁶⁵ See *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2084 (2011) (requiring "a robust consensus of cases of persuasive authority" to clearly establish constitutional rights (internal quotation marks omitted)).

¹⁶⁶ *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances. Indeed, in [*United States v. Lanier*, 520 U.S. 259, 268 (1997)], we expressly rejected a requirement that previous cases be 'fundamentally similar.'").

a case in their circuit that holds warrantless GPS installations constitutional.¹⁶⁷ *Jones* subsequently overrules the Ninth Circuit case, making the police installation retrospectively unconstitutional. Because the Ninth Circuit's binding appellate precedent authorized the installation, *Davis* controls and the good-faith exception applies, preventing the exclusionary rule from barring evidence. Another way of phrasing the result is to say that binding appellate precedent clearly established the constitutionality of employing GPS tracking, so that a police officer in the Ninth Circuit has strong legal authority to install the GPS device. The clearly-established standard thus offers a generalized formulation of the *Davis* holding and indeed of the whole *Leon* line.¹⁶⁸

While the example above establishes that the proposed standard harmonizes with *Davis*, it does not yet address the issue of what nonbinding precedent will suffice to support the application of the good-faith exception. The easiest hypothetical case would involve unanimous affirmation of warrantless GPS installations by all circuit courts, except the one in which the installation takes place. Despite the lack of binding appellate precedent, the constitutionality of warrantless GPS use in this example has so much support that an officer could not reasonably believe that a warrantless GPS installation violates the Constitution.¹⁶⁹ Here the qualified immunity and good-faith analyses would both cover an officer: the reasonable police officer not only could believe that the action was constitutional (granting qualified immunity), but he would have no reason to doubt it (granting the good-faith exception).

Even when fewer circuits have weighed in on an issue, unanimity should carry decisive weight. When even a few federal circuit courts have authorized a practice and no precedential court disagrees, a reasonable police officer would have no reason to believe the practice violates the Fourth Amendment. The Court's qualified immunity doctrine offers guidance here, establishing that "a robust consensus of cases of persuasive authority" meets the standard.¹⁷⁰

Conflict between courts, however, produces very different consequences in the good-faith analysis than in the qualified immunity analysis. The Court has said that when circuit courts disagree on the constitutionality of an action, a police officer may reasonably still believe the action is constitutional and

¹⁶⁷ The Ninth Circuit Court of Appeals held in 1999 that the warrantless installation of a GPS device on a vehicle parked in a driveway is not a search. *United States v. McIver*, 186 F.3d 1119, 1126–27 (9th Cir. 1999).

¹⁶⁸ As argued above, the good-faith cases establish a rule that exclusion is inappropriate when officers are acting on legal authority that turns out to be invalid through no fault of their own. *Herring's* exception for attenuated negligence by police clerks is perhaps best understood as a *de minimis* exception to this rule. See *Herring v. United States*, 555 U.S. 135, 137 (2009).

¹⁶⁹ Improbable though these facts may be, they helpfully emphasize the excessive formalism at the root of the narrow view of *Davis*. Facing such unanimous agreement that a police action is constitutional, an officer in the lone undecided circuit would have no reason to suppose that his circuit would disagree with such a considerable body of persuasive precedent. In other words, there could be little deterrent value to suppression in such a case.

¹⁷⁰ *Ashcroft*, 131 S. Ct. at 2084.

receive qualified immunity protection.¹⁷¹ For qualified immunity purposes, in other words, doubt favors the officer. But in the suggested analysis for the good-faith exception, doubt would favor the defendant's Fourth Amendment rights.¹⁷² When nonbinding courts disagree, the officer can no longer say the constitutionality of his action is clearly established.¹⁷³ In such a case, the officer should refrain from acting or face the suppression of any evidence he obtains through the potential violation.¹⁷⁴ In many of the lower-court GPS cases, both broad and narrow, this test for the good-faith exception would reach the same result the courts reached.¹⁷⁵

Some practical complications would arise of course. For one thing, not every relevant nonbinding precedent will equally speak to the facts of a case at hand. In *Baez*, for example, police tracked the defendant's car for nearly a year,¹⁷⁶ whereas in *Katzin* the monitoring lasted just a few days.¹⁷⁷ Although these factual distinctions played little role in the courts' analyses, one can imagine these differences becoming important if, for example, three nonbinding circuit courts of appeals had authorized warrantless GPS installations for less than a month. Whether a reasonable police officer could doubt that a year-long installation was permissible in these circumstances does not find an easy answer. Again, the Court's qualified immunity jurisprudence may provide some

¹⁷¹ *Wilson v. Layne*, 526 U.S. 603, 618 (1999).

¹⁷² This result does not run counter to the Court's view that in the context of applying for a warrant that turns out to be invalid, the standard for applying qualified immunity should be the same as that for applying the good-faith exception. See *Malley v. Briggs*, 475 U.S. 335, 344 (1986). There the Court is referring to the application of the good-faith exception when a judge issues a warrant, not when an officer is attempting on her own to determine the weight and relevance of conflicting court decisions. *Id.*

¹⁷³ According to this view, those district courts granting the good-faith exception to searches conducted after the D.C. Circuit's *Maynard* decision and before *Jones* would be in error. See, e.g., *United States v. Batista*, No. 5:12cr11, 2013 WL 782710, at *7 (W.D. Va. Feb. 28, 2013) (granting good-faith exception to officers who acted in the face of a circuit split).

¹⁷⁴ One can imagine an endless variety of scenarios of courts agreeing and disagreeing with one another on the constitutionality of an action. Determining precisely which scenarios should lead to a finding that the law was clearly established is beyond the scope of this Note. Through their qualified immunity and good-faith exception cases, the courts will continue to work through these scenarios over time.

¹⁷⁵ See *United States v. Oladosu*, 887 F. Supp. 2d 437, 448 (D.R.I. 2012); *United States v. Baez*, 878 F. Supp. 2d 288, 294 (D. Mass. 2012); *United States v. Ortiz*, 878 F. Supp. 2d 515, 543 (E.D. Pa. 2012); *United States v. Lujan*, No. 2:11CR11-SA, 2012 WL 2861546, at *3 (N.D. Miss. July 11, 2012); *United States v. Lee*, 862 F. Supp. 2d 560, 571 (E.D. Ky. 2012); *United States v. Katzin*, No. 11-226, 2012 WL 1646894, at *1 (E.D. Pa. May 9, 2012); *United States v. Leon*, 856 F. Supp. 2d 1188, 1193 (D. Haw. 2012). *Oladosu* noted and even plotted out this timeline based on the "legal landscape at the time of the Fourth Amendment violation." *Oladosu*, 887 F. Supp. 2d at 447. The proposed standard differs from *Oladosu*'s approach mainly in its manner of surveying this legal landscape.

¹⁷⁶ *Baez*, 878 F. Supp. 2d at 292 (347 days).

¹⁷⁷ *Katzin*, 2012 WL 1646894, at *2.

guidance, but on this question the Court has not provided entirely consistent answers.¹⁷⁸

2. Policy Considerations Supporting the “Clearly Established” Standard

Several considerations support the adoption of such a standard. (1) The standard is consistent with existing Supreme Court precedent on the good-faith exception; (2) it would help to prevent the constitutional violations that raise exclusionary rule problems; (3) it provides a readily administrable standard that courts and police officers are already familiar with on precisely these issues; and, (4) it allows police across the country to adopt new investigative techniques without having to wait for test cases in their jurisdictions.

First, a “clearly established” standard fits within the Supreme Court’s existing precedent. The central theme running through the *Leon* line of cases is that exclusion is not appropriate when police are following the law. Each case involves police officers doing exactly what they had good reason to believe was lawful.¹⁷⁹ Allowing police officers to rely on clearly established law represents a modest extension of the existing principle of the good-faith exception. It extends the principle by permitting officers to rely not only on the law of their own jurisdiction, but also on that of other jurisdictions. It does so modestly because it requires strong evidence that the prospective action is lawful.

Second, the simplicity of the clearly-established standard makes it relatively easy for police officers to avoid violations. Because the heavy costs of exclusion arise only when police violate the Fourth Amendment, a standard that helps officers avoid violations will reduce those costs. The standard provides clarity for law enforcement officers by requiring them (or, more likely, their supervisors) to keep track of a limited range of nonbinding case law, and the objective standard encourages supervisors to provide adequate training. When in doubt, officers should err on the side of inaction. The trade-off to caution, of course, is less vigorous police action. In the GPS cases, applying the clearly-established standard would likely have led to policies requiring a warrant for the use of GPS tracking. Securing warrants could slow down some police investigations or even render certain technologies infeasible. Some answers to this problem present themselves. For one thing, warrant requirements grow less

¹⁷⁸ ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 580 (6th ed. 2012) (“[T]here is great confusion in the lower courts as to whether and when cases on point are needed to overcome qualified immunity.”).

¹⁷⁹ *Herring* provides a slight wrinkle because police negligence played a role in bringing about the constitutional violation. See *supra* Part II.C. In *Herring*, police officials in one district negligently failed to update a warrant database, which led to a warrantless arrest. *Herring v. United States*, 555 U.S. 135, 137–38 (2009). However, the arresting officer who relied on the faulty information from the database had no reason to doubt its accuracy, so he was following clearly established law. *Id.* at 137.

burdensome with improvements in communication technologies.¹⁸⁰ In addition, caution makes particular sense in cases of new technology, where the full implications of privacy invasions may not be immediately evident.¹⁸¹

Third, both courts and police officers could readily apply this standard in the good-faith context because they already do so in qualified immunity cases. As indicated above, the standard applies with some modifications in the good-faith context. The approach recommended here would discourage an officer from acting unless the law clearly permits an action, whereas with qualified immunity the officer may act when the action is not clearly prohibited. This means in effect that qualified immunity would shield more police behavior than the good-faith exception. The justification for this difference is that deterrence plays a different role in the contexts of qualified immunity and exclusion.¹⁸² The possibility of personal liability primarily deters individual police officers from taking unreasonable action,¹⁸³ and fairness to officers drives much of the qualified immunity doctrine.¹⁸⁴ The possibility of evidence suppression will deter some individual officers, but it will also deter law enforcement agencies from ineffective officer training and from investigative policies and procedures based on guesses as to what the law is.

Fourth, if the “clearly established” approach does not encourage police departments to adopt new investigative techniques, it does at least permit the adoption once a practice has gained sufficient judicial support. Law enforcement agencies need to be able to adopt appropriate new technologies and techniques as they become available. At the same time, appropriateness is not always obvious and some check on the use of invasive new technologies is desirable. With the approach recommended here, early adopters of a new technology will take the risk that investigations relying on the technology may fall apart if a court finds their actions unlawful. However, once courts have

¹⁸⁰ See Donald L. Beci, *Fidelity to the Warrant Clause: Using Magistrates, Incentives, and Telecommunications Technology To Reinvigorate Fourth Amendment Jurisprudence*, 73 DENV. U. L. REV. 293, 295 (1996) (noting, more than fifteen years ago, that “with current computer and electronic telecommunications technology, police officers can now swiftly obtain a warrant without leaving the area of investigation”).

¹⁸¹ Although police often use GPS simply to place suspects at the scene of a crime, see, e.g., *Katzin*, 2012 WL 1646894, at *2, Justice Sotomayor in her *Jones* concurrence described the depth of personal detail police might glean from GPS data. *United States v. Jones*, 132 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring) (“GPS monitoring generates a precise, comprehensive record of a person’s public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.”).

¹⁸² See Laurin, *supra* note 28, at 738.

¹⁸³ *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 70 (2001) (“The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations.”).

¹⁸⁴ E.g., *Wilson v. Layne*, 526 U.S. 603, 618 (1999) (“If judges thus disagree on a constitutional question, it is unfair to subject police to money damages for picking the losing side of the controversy.”).

upheld the validity of a practice, law enforcement across the country can then rely on the technology at least with respect to current investigations.¹⁸⁵

3. *Rethinking the Object of Deterrence*

One objection to the proposed approach will be that it does not fully embrace the good-faith rationale that the Court has espoused in recent cases. The Court has insisted that the lack of police culpability is the strongest thread running through the *Leon* cases. Although a “clearly established” standard is consistent with the Court’s good-faith cases, it does not necessarily permit all the police action that a pure culpability analysis would permit. For instance, before any circuit courts had addressed the legality of warrantless GPS installations and the law was not “clearly established,” what were law enforcement officials to do? Under the “clearly established” standard, they would have lacked legal authority and would therefore have risked exclusion of evidence obtained as a result of the use of GPS. The Court’s culpability analysis would at least potentially authorize the use of the technology in the face of unsettled law, as it might assume, as Justice Breyer does, that acting in the face of unsettled law is not culpable behavior.¹⁸⁶ As Justice Sotomayor points out, however, culpability takes a backseat to deterrence in the Court’s analysis of whether exclusion should apply.¹⁸⁷ Culpability matters only because it indicates whether there is anything to deter. Cases may arise, however, in which an officer acts without culpability but deterrence would still make sense. A well-meaning but badly trained officer could violate Fourth Amendment rights without any personal culpability at all. The officer himself could not be deterred from making bad choices, but a law enforcement agency that frequently botches cases could be encouraged to improve its officer training.¹⁸⁸ Deterrence, in

¹⁸⁵ Until the Supreme Court has authorized a technology, of course, the possibility always remains that its use will be struck down or limited in future investigations.

¹⁸⁶ *Davis v. United States*, 131 S. Ct. 2419, 2439 (2011) (Breyer, J., dissenting).

¹⁸⁷ See *id.* at 2435 (Sotomayor, J., concurring).

¹⁸⁸ See William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J.L. REFORM 311, 368 (1991) (“Establishment of a ‘good faith’ exception would reduce the incentive for departments to offer, and for officers to undertake, extensive training in the law.”); Laurin, *supra* note 28, at 738 (“[A]t the level of police management there are greater political and bureaucratic incentives, and likely greater information, to ensure that searches and arrests bear fruit in ultimate case dispositions.”); Nolasco et al., *supra* note 53, at 249 (“The deterrent value of the exclusionary rule in these cases is hardly minimal and its application would likely encourage better police practices and departmental policies in the same law enforcement agency.”); Christopher Totten & Sutham Cobkit (Cheurprakobkit), *The Knock-and-Announce Rule and Police Searches After Hudson v. Michigan: Can Alternative Deterrents Effectively Replace Exclusion for Rule Violations?*, 15 NEW CRIM. L. REV. 414, 453 (2012) (“[T]he majority of police chiefs (64.6%) of major U.S. cities in this survey perceived that the exclusion of evidence is helpful in deterring police misconduct

other words, can still play a role in preventing non-culpable but unconstitutional behavior.

V. CONCLUSION

The Fourth Amendment's ban on unreasonable searches and seizures seeks to balance privacy rights with vigorous law enforcement, and the exclusion of illegally obtained evidence plays an uncertain role in maintaining that balance. In the Court's current jurisprudence, exclusion may be justified only by its capacity to deter police officers from future violations. So when police rely on a legal authority that subsequently turns out to have been invalid, their good-faith behavior renders deterrence, and hence exclusion, inappropriate.

Although *Davis* certainly extended the good-faith exception to reliance on binding judicial precedent, lower courts have disagreed on the applicability of the exception when police act on unsettled law. Two general approaches to the question are currently playing out in the lower courts in GPS cases arising from *United States v. Jones*, which held that warrantless GPS installation is a search under the Fourth Amendment. On one side are courts that read *Davis* as a narrow extension of the good-faith exception to reliance on binding precedent. On the other are courts that read *Davis* as a broad extension of the exception to cover all cases in which police are not grossly negligent, reckless, or deliberately in violation of the law. Which side ultimately prevails will have a significant impact on a defendant's motivation and ability to challenge Fourth Amendment violations.

This Note proposes a test that both hews to the core of the *Leon* line of good-faith cases and also allows police to adopt new technologies. The "clearly established" standard provides a readily administrable principle for courts and law enforcement to apply—they are already doing so in qualified immunity cases—but it also fits within existing Supreme Court precedent while providing protection for Fourth Amendment rights. Such a rule justifies the costs of exclusion by deterring police from taking actions that threaten the privacy protections of the Fourth Amendment.

related to the knock-and-announce rule (albeit somewhat less so than training, education, and discipline).").

